United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

ORIGINAL

75-7179

To be argued by
JAMES M. LEONARD

United States Court of Appeals

FOR THE SECOND CIRCUIT

CHARLES SCALAFANI,

Plaintiff-Appellee,

against

MOORE McCORMACK LINES, INC., "Mormacdrago" D/A 1/2/71,

Defendant-Appellant and Third Party Plaintiff-Appellee,

against

UNIVERSAL TERMINAL AND STEVEDORING CORP.,

Third Party Defendant-Appellant.

On Appeal from the United States District Court for the Eastern District of New York

REPLY BRIEF ON BEHALF OF THIRD-PARTY DEFENDANT-APPELLANT

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REPLY BRIEF ON BEHALF OF THIRD-PARTY DEFENDANT-APPELLANT

I

Shipowner's brief in answer to the appellate brief of Stevedore adopts the same erroneous concept of law as did the Court below.

Pages 17 and 18 of Shipowner's brief indulge in what may be described, most charitably, as an exercise in question-begging. Shipowner cites the well known decisions in *Italia Societa* v. *Oregon Stevedoring Co., Inc.*, 1964, 376 U. S. 315; *Nicroli* v. *Den Norske Afrika-og Australielinie Wilhelmsens Dampskibs-Aktieselskab*, 2 Cir., 1964, 332 F. 2d 651; *DeGioia* v. *United States Lines Co.*, 2 Cir., 304 F. 2d 421; *Henry* v. *A/S Ocean*, 2 Cir., 1975, 512 F. 2d 401.

Shipowner, quite correctly, urges that these decisions stand for the proposition that, where a "workmanlike performance" by Stevedore will eliminate the risk to its employees and Stevedore fails in its duty to tender Shipowner such a "workmanlike performance", Stevedore must ultimately indemnify Shipowner for the consequences.

All very basic—and not in the least disputed by Stevedore herein.

Shipowner, in furtherance of its attempts to foist an insurer's obligation upon Stevedore, ignores the fact that the courts have consistently held that it is the indemnitee which has the burden of proof to sustain the indemnity claim.*

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* The burden of proof with regard to all issues in the third-party action is on Shipowner. *Pacific Far East Line Inc.* v. *Jones Stevedoring Co.*, 9 Cir., 1965, 346 F. 2d 642, 645; *Waterman Steamship Corporation* v. *Brady-Hamilton Stevedore Co.*, DC D. Ore. 1965, 243 F. Supp. 298. Its failure to sustain that burden should have impelled the Trial Court to dismiss the third-party action as a matter of law. *Maillard* v. *American Export Isbrandtsen Lines, Inc.*, 2nd Cir., 1969, 406 F. 2d 322.

Happily content in its assumption that citation of authority to demonstrate that Stevedore must render a workmanlike performance *ipso facto* establishes that Stevedore *has not* rendered a "workmanlike performance". (a nexus supported by neither the decisional law nor the evidence in the case at bar), the Shipowner expressly adopts the theme which taints the lower court's decision—the Stevedore must act as Shipowner's insurer.

> "Courts have consistently held that it is the duty and responsibility of the stevedore contractor *to insure* that their employees are furnished with a safe place to work to include means of access to the vessel which would include the vessel's gangway. *Crumady* v. *Fisser,* 358 U. S. 423; *Vaccaro* v. *Alcoa Steamship Co.,* 405 F. 2d 1133 (2nd Cir. 1968)." (emphasis supplied)

We do not know if Shipowner seriously seeks to deny effect to Judge Lumbard's opinion in *Calderola* v. *Cunard Steamship Co., Ltd.,* 2 Cir., 1960, 279 F. 2d 475, 478 (cited on pp. 5-6 of our main brief) but there is a plentitude of recent authority reaffirming the proposition that Stevedore is not Shipowner's insurer and that Shipowner's burden is to adduce competent evidence somehow establishing—apart from the mere happening of the accident—a breach of Stevedore's warranty of "workmanlike performance".

Thus the Fifth Circuit in *Parker* v. *The S/S Dorothe Olendorff,* 5 Cir. 1973, 483 F. 2d 375 said at pp. 381-382:

> "If it were not clear at the time of the decision below, it has now become settled law that a third-party action for indemnity under the *Ryan* doctrine must flow from negligence or a breach of the stevedore's warranty of workmanlike perform-

> ance; the stevedore is not an insurer either against affirmative liability or against costs and attorneys' fees resulting from actions brought by injured longshoremen. *Diaz* v. *Western Ventures, Inc.,* 467 F. 2d 1361 (5th Cir. 1972), cert. denied, 410 U. S. 967, 93 S. Ct. 1445, 35 L. Ed. 2d 702 (1973)."

See also *Diaz* v. *Western Ventures, Inc.,* 5 Cir., 1972, 467 F. 2d 1361, 1363; *Plaisance* v. *Shell Oil Co.,* DC., Ed La., 1971, 323 F. Supp. 654, 656-657.

In general terms, it may be said that Stevedore's "workmanlike performance" implies a duty to proceed with reasonable safety under the circumstances obtaining. *Calderola* v. *Cunard S.S. Co.,* 2 Cir., 1960, 270 F. 2d 475, 489; *Ray* v. *Compagnie Naviera Continental S.A.,* D. C. Md., 1962, 203 F. Supp. 206, 214; *Morales* v. *Dampskibs A/S Flint,* D.C. S.D.N.Y. 1966, 264 F. Supp. 829, aff'd per curiam on opinion below, 2 Cir., 370 F. 2d 569.

Shipowner labors mightily to create the impression that the Safety and Health Regulations for Longshoring (29 CRF Sect. 1504) somehow place upon Stevedore a duty to correct a latent defective condition of the ladder created by Shipowner or its agent.

Shipowner misconstrues the intent of Regulations, apparently choosing to believe that they may be used as a device to reward a culpable Shipowner with indemnity against a blameless Stevedore. Section 9.2(b) (29 CFR Section 1504.2(b)) states:

> "(b) It is not the intent of the regulations of this part to place additional responsibilities or duties on owners, operators, agents or masters of vessels unless such persons are acting as employers, nor *is it the intent of these regulations to relieve such owners, operators, agents or masters of vessel from*

> *responsibilities or duties now placed upon them by law, regulation or custom.*" (emphasis supplied)

That the Stevedore concededly owes duties to its employees does not mean that the Shipowner is to be absolved from its own misdeeds, *McNeil* v. *Lehigh Valley Railroad Co.*, 2 Cir., 1967, 387 F. 2d 623, 624:

> "The trial court's refusal to charge the jury with respect to the duty which Spencer owed plaintiff did not constitute error since a stevedore's breach of duty to its employee does not give rise to a right of indemnity in favor of a shipowner sued by that employee."

Significant also is Section 9.25(b) (29 CFR Section 1504.25(b)) of the Regulations which prescribes the standard as *visible* safety.

It is submitted that the Regulations do not afford Shipowner aid in its quest to avoid its own fault. The testimony shows as a matter of law that Stevedore fully complied with its warranty of workmanlike service.

In absolute contradiction to the implication by the Shipowner that Stevedore, as a putative insurer, must bear responsibility for the safety of means of access to the ship, is the actual state of the law.

Notwithstanding the artful phrasing of the language of Shipowner's brief, we submit that the law places the burden of initially offering to land-based maritime workers proper access to the vessel squarely upon the shoulders of Shipowner.

> "It is unnecessary to decide whether the *Ryan* doctrine applies because the facts of this case simply do not support Flota Mercante's claim for indemnity. *The responsibility for providing safe ac-*

> *cess was solely that of the shipowner,* not the responsibility of the employees of National Cargo. There is no evidence showing that National Cargo's employees contributed in any way to the creation of the dangerous condition. The shipowner did not fulfill its duty to furnish safe access, and it is responsible for its own negligence. Flota's claim that it is entitled to indemnity from National Cargo for its own negligence is meritless." (emphasis supplied)
>
> *Arthur* v. *Flota Mercante Gran Centro Americana, S.A.,* 487 F. 2d 561, 564 (1973).

Perhaps recognizing the deficiencies in its legal position, Shipowner attempts the prestidigitator's manuever of implying that Stevedore *created* the unseaworthy condition (compare page 19 of Shipowner's brief).* Suffice it to say that the actual state of the record rebuts, *per se,* this claim. It was Shipowner which tendered the gangway to Stevedore's employees, it was Shipowner which had the duty to, and did, undertake cleanup measures, it was the Shipowner which made periodic inspections to determine the adequacy of the sawdust covering. To assume that the longshoremen were gifted with meteorological potency as to show the production of snow and ice blinks reality.

We do not challenge in the slightest the notion that a Stevedore with *knowledge* of a defect or encountering

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* An inspection of the reference cited by Shipowner (48a) is of no sustenance to Shipowner. Plaintiff expressly disclaimed lack of knowledge of the identity of the individuals referred to and his testimony in this respect is simply speculative by its terms. We may belabor the obvious in stating that the presence of snow and ice is ascribable solely to natural phenomena while the sawdust was placed by Shipowner's representatives.

a hazard whose danger is discoverable by a cursory inspection may be required to indemnify Shipowner.* But we do deny absolutely that a Stevedore faced with a ladder or gangway which *appears* to be safe may be held liable to indemnify Shipowner. (See cases cited in Point I of our Brief. Also see *Sciarrillo* v. *S/S Fred Christensen,* D.C. S.D.N.Y., 1962, 206 F. Supp. 182, 186-187 and cases cited by Feinberg, J. therein.)

In the light of the actual state of the law the cases cited by Shipowner are totally unavailing. For example, in *Henry* v. *A/S Ocean,* 2 Cir., 1975, 512 F. 2d 401, this Court specifically pointed out, at p. 406, that the Stevedore proceeded in the face of "known defects".

We must view with some astonishment Shipowner's reference to the decision of this Court in *Bertino* v. *Polish Ocean Line,* 2 Cir., 1968, 402 F. 2d 863. If there is any fact pattern which exemplifies the fallacies indulged in by Shipowner, it is that pattern presented by the *Bertino* decision.

In *Bertino,* the trial court found (402 F. 2d 863) that the spreading of sawdust on what would be ordinarily recognizable as a hazardous deck condition fully justified the description of "trap". There, as here, Shipowner contended that the stevedore must be chargeable with some species of "constructive notice" (402 F. 2d at p. 865).

This Court firmly rejected such a contention. In so doing, Judge Moore's opinion fully cited, indeed relied upon, some of the very decisions which Shipowner now incorrectly urges in its favor.

This Court recognized then that the primary duty to maintain the vessel is that of Shipowner. Where ship-

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* Absent either (a) conduct sufficient to preclude indemnity (b) assurance, express or implied of safety or (c) a direction to proceed.

owner attempts corrective action but does so in a manner which cloaks a defective condition with the appearance of safety it must bear the ultimate legal and economic responsibility for its actions.*

The result which was arrived at in *Bertino,* and which should be arrived at there, is in full consonance with the rationale of the Supreme Court in *Crumady* v. *The Joachim Hendrik Fisser,* 1959, 358 U. S. 423, 79 S. Ct. 445, 3 L. Ed. 2nd 413, and with the holding of this court in *DeGioia* v. *United States Lines,* 2 Cir., 1962, 364 F. 2d 421. These cases teach that the party best able to cope with the danger must bear responsibility for a failure to take steps to meet the risk. In the case at bar, there is no evidence to suggest that such party was other than Shipowner.

II

Shipowner cannot rely upon any claimed contributory negligence of plaintiff to require Stevedore to indemnify it.

We shall not comment upon the Shipowner's attempts to divest itself of the adverse finding of the trial court in the case in main.

Nor shall we treat of Shipowner's argument addressed to plaintiff's asserted contributory negligence, save to ob-

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* An implied assurance of safety by Shipowner's representative is participation in the decision to work by the longshoreman. Shipowner, having assured the safety of a particular area, cannot be heard to complain when it is in fact used. *Hodgson* v. *Lloyd Brasileiro Patrimonio Nacional* v. *Murphy-Cook & Co.,* 3 Cir., 1961, 294 F. 2d 32; *Hudson Steamship Company, Ltd.* v. *Colon,* 1 Cir., 1963, 314 F. 2d 44; *Hagans* v. *Farrell Lines, Inc.* v. *Lavino Shipping Company,* 3 Cir., 1956, 237 F. 2d 477.

serve that the trial court was fully justified in finding that the gangway presented an appearance of safety plus an implied assurance by Shipowner that adequate anti-skid measures had been taken. We have urged, in our main brief, that the (fully sustainable) finding of the trial court that plaintiff was guilty of no contributory negligence should have mandated a further finding by that court that Stevedore had rendered a workmanlike performance.

On page 20 of its brief, Shipowner argues that since a dangerous condition did in fact exist, Stevedore had a duty to rectify it. It urges that the testimony of the Stevedore foreman that the gangway was not unsafe avails the Stevedore nothing.

Shipowner misstates the relevance of the O'Connor testimony to the issues in the indemnity action. As we have pointed out in our main brief, both the ship's mate and the Stevedore's superintendent gave testimony to the effect that to their observation, the gangway *seemed* safe.

The warranty of seaworthiness is not to be equated with the warranty of workmanlike performance. Stevedore's responsibility is to react to conditions which do not appear to be safe. In view of the uncontradicted testimony concerning the appearance of the gangway, we submit that the trial court had no evidence upon which to conclude otherwise.

We may transcend the scope of the record and proceed directly to the Court's finding of no contributory negligence by plaintiff. This finding, we urge, imposed an absolute mandate on the trial court to find in Stevedore's favor. No other conclusion can be drawn in the light of the clear and logical exposition given by this Court in *Bertino* v. *Polish Ocean Line,* 2 Cir., 1968, 402 F. 2d 863, 866:

"Even if the inference that Bertino knew of the oil can be drawn from his knowledge that 'sawdust means spilled oil' and that knowledge be imputed to American, it would also be necessary to impute to American Bertino's belief that the situation was now safe, *thus eliminating American's duty to correct the defect.*" (emphasis supplied)

Bertino v. *Polish Ocean Line,* 402 F. 2d 863, 866 (1968).

CONCLUSION

So much of the decision of the Lower Court as finds Stevedore liable to indemnify Shipowner is erroneous and should be vacated and judgment should be entered on behalf of Stevedore dismissing the third-party complaint.

Respectfully submitted,

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U.S. COURT OF APPEALS FOR THE SECOND CIRCUIT

SCALAFANI

VS

MOORE MC CORMACK

VS

UNIVERSIAL TERMINAL

AFFIDAVIT OF SERVICE BY MAIL

State of New York, County of New York, ss.:

HAROLD DUDASH, being duly sworn deposes and says that he is agent for Commette, Quencer & Annunizato the attorney for the above named third-party defendant-appellant herein. That he is over 21 years of age, is not a party to the action and resides at 2346 Holland avenue, BRONX, N.Y.

That on the 24th day of October, 1975, 19, he served the within reply brief on behalf of third-party defendant appellant

IRVING BUSHLOW, 26 Court Street, Brooklyn, N.Y.

upon the attorneys for the parties and at the addresses as specified below

by depositing two copies to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at 90 Church Street, New York, New York directed to the said attorneys for the parties as listed above at the addresses aforementioned,

that being the addresses within the state designated by them for that purpose, or the places where they then kept offices between which places there then was and now is a regular communication by mail.

Sworn to before me, this 24th day of October, 1975, 19

Harold Dudash

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
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Attorney for Moore-McCormack

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